BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of Infrastructure	)	CC Docket No. 96-237
Sharing Provisions in the	)	
Telecommunications Act of 1996	)	
	)	

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REPLY COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY

ROBERT M. LYNCH
DURWARD D. DUPRE
MICHAEL J. ZPEVAK
DARRYL W. HOWARD

Attorneys for
SOUTHWESTERN BELL TELEPHONE COMPANY

One Bell Center, Suite 3520
St. Louis, Missouri 63101
(314) 235-2507

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SUMMARY*

The comments filed in this proceeding reflect a broad consensus agreeing with the Commission's tentative conclusion that detailed rules regarding infrastructure sharing are not necessary, but should be a matter of free negotiations between qualifying carriers and incumbent LECs. Minimum guidelines will be sufficient to fulfill the Act's requirements and provide the structure and flexibility needed in those negotiations.

The Commission should recognize that Sections 259 and 251 serve entirely different goals. The Commission should reject any notion that Section 251 must first be "exhausted" before Section 259 can be used, and that Section 251 and its requirements be read into Section 259. MCI's attempt to make "information services" subject to infrastructure sharing has no basis in the statute.

Establishing a rebuttable presumption that "rural telephone companies" lack economies of scale or scope would be reasonable and in the public interest. However, inasmuch as Section 259 does not disqualify any carrier from being a qualifying carrier based upon size or classification, the Commission should reject suggestions for artificial limits on who may be a qualifying carrier.

As required by Section 259, infrastructure sharing is limited to the areas where the qualifying carrier "qualifies" -- where it operates as an eligible carrier lacking economies of scale and scope, and is not competing with the sharing LEC. Infrastructure sharing arrangements are not available to any other carriers, nor can their prices be changed to transform them into Section 251 agreements. As Section 259 establishes, infrastructure sharing arrangements, including their

* The abbreviations used in this Summary are as defined in the main text.

terms and conditions, are not common carriage or subject to Section 251(i). Infrastructure sharing is also not required wherever a sharing LEC and qualifying carrier compete.

A qualifying carrier that is an incumbent LEC should not be required to share shared infrastructure with any other qualifying carrier, or to unbundle that shared infrastructure with any carrier. Carriers wanting the shared infrastructure must negotiate with the providing carrier, the incumbent LEC actually providing the infrastructure. Termination provisions should be a matter of negotiation between the parties, without Commission intervention. Throughout the term of any infrastructure sharing arrangement, the qualifying carrier must remain qualified and the sharing arrangement must continue to be economically reasonable and in the public interest. Sharing LECs have no obligation to expand capacity or deploy new infrastructure to meet the requests of a qualifying carrier.

Infrastructure sharing must accommodate intellectual property rights, which can only be determined on a request-by-request basis. One cannot presume, as AT&T suggests, that intellectual property rights and licenses will not be violated. The Act does not permit those rights to be ignored or to be taken from the owner.

Setting prices for infrastructure sharing equal to incremental cost would be economically unreasonable because sharing LECs would not be compensated for all costs related to providing the infrastructure. Sharing LECs must be compensated for all relevant costs in order for the standards established by Section 259 to be met.

Although sharing LECs and qualifying carriers will necessarily have to coordinate infrastructure sharing arrangements, Section 259 does not insert qualifying carriers into the network planning and decision-making process of the sharing LECs.

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REPLY COMMENTS OF
<u>SOUTHWESTERN BELL TELEPHONE COMPANY</u>

Southwestern Bell Telephone Company ("SWBT") files these Reply Comments to the various comments filed in this proceeding. The comments reflect a broad consensus agreeing with the Commission's tentative conclusion that detailed rules regarding infrastructure sharing are not necessary, but should be a matter of free negotiations between qualifying carriers and incumbent local exchange carriers ("LECs"). In other instances, however, commenters seek to advance their competitive agendas in contravention of the language of Section 259 and its universal service goals.

I. THERE IS WIDE AND VARIED SUPPORT FOR THE PROPOSAL TO RELY UPON NEGOTIATIONS WITHOUT DETAILED RULES

Most of the parties offering comments agreed with the Commission's suggestion that infrastructure sharing arrangements should be largely the product of negotiations among the parties. <u>See</u> Ameritech, p. 3; Minnesota Independent Coalition ("MnIC"), p. 8. Some noted the history of successful negotiations between non-competing telephone companies. GTE Service Corporation ("GTE"), p. 2; Pacific Telesis Group, p. 7; Rural Telephone Coalition ("RTC"), pp.

13-15. Those agreements, negotiated in a cooperative manner, have ensured that a broad base of customers has access to the telecommunications services they need, regardless of the capabilities of their serving carrier.

The parties also agree that detailed rules are not required in the implementation of Section 259. See Jackson Thornton & Co., p. 3; MCI Telecommunications Corporation ("MCI"), p. 4; United States Telephone Association ("USTA"), p. 15. Minimum guidelines will be sufficient to provide the structure and flexibility needed to guide cooperative negotiations between requesting and providing LECs. As GTE observes at page 8 of its comments, if the same types of regulations are established for Section 259 as for Section 251 and 252, "it will discourage the cooperative nature of infrastructure sharing."

II. SECTIONS 251 AND 259 ARE SEPARATE AND INDEPENDENT, AND CANNOT BE MIXED AND MATCHED

The Commission should recognize, as do diverse commenters,[2] that Sections 251 and 259 serve entirely different goals -- Section 259 supports universal service goals, while Section 251 is aimed at competitive objectives. The Telecommunications Act of 1996 ("Act")[3] correspondingly recognizes two separate and independent agreements -- Section 259 infrastructure sharing agreements and Section 251 agreements. Notably, neither section references the other in any way, indicating the independence of one from the other.

The National Cable Television Association, Inc. ("NCTA") nevertheless takes the position

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[2] See, e.g., Sprint Corporation, p. 2; USTA, pp. 3, 6; Frontier Corporation, pp. 1, 2.

[3] Pub. L. No. 104-104; 110 Stat. 56 (1996).

that Section 259 supplements Section 251 when it argues that Section 259 arrangements are limited to instances where small and rural carriers cannot obtain the requested capabilities under Section 251. NCTA, p. 7. The Act neither requires nor contemplates such a process. A "qualifying carrier" can also be a "requesting carrier" under Section 251, but that carrier has the discretion to decide on how to proceed.[4] There is simply no support for the notion that a "qualifying/requesting" carrier first must "exhaust" Section 251 before resorting to infrastructure sharing under Section 259.

Several commenters also argue that resale, interconnection, or unbundled network elements should be available to qualifying carriers through infrastructure sharing.[5] The Act does not contemplate that sharing LECs make available their own services for resale as part of infrastructure sharing. SWBT, p. 5. Section 259(a) specifies that only the underlying functionalities must be made available to enable qualifying carriers to provide telecommunications services or access to information services; the sharing carrier has no obligation to provide wholesale telecommunications services under Section 259. The attempt by the RTC to expand the scope of Section 259 by inserting "telecommunications services" and "telecommunications equipment" into Section 259 simply has no basis in the statute. RTC, p. 17.

MCI also attempts to expand the scope of Section 259 by asserting that infrastructure

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[4] See also MnIC, p. 1 ("A qualifying, non-competitive interconnection request may be made under either Section 251 or Section 259"); RTC, p. 5 ("There is nothing in the Act that can be interpreted to prevent a qualifying carrier from obtaining the desired infrastructure through Section 259 or Section 251.").

[5] For example, see Jackson Thornton & Co., p. 4; RTC, pp. 3, 4.

sharing encompasses "information services." MCI, p. 6. MCI ignores the distinction between 'what is eligible for sharing' versus 'to what use the infrastructure may be put.' What is eligible for sharing is limited by the terms "public switched network" and "telecommunications." Section 259(a). "Information services" are as a matter of statute not "telecommunications,"[6] and "public switched network" has never been used or understood by the Commission or the industry to refer to enhanced services or information services. Once shared, the infrastructure is then to be used by the qualifying carrier to "provide telecommunications services, or to provide access to information services." Section 259(a). Thus, for example, the qualifying carrier can use shared infrastructure so that its customers can have access to information services, which could be procured from an enhanced service provider, the sharing LEC, or another party. There is, however, no obligation to share information services or the facilities or software used to provide information services.

MCI also asserts that "Congress intended the Commission to implement rules permitting information on terms more favorable than they would receive, either under Section 251, or under any agreement among non-competing LECs prior to the passage of the 1996 Act." MCI, pp. 2-3. Based on this belief, MCI argues that the Commission should make its rules on interconnection, unbundled network elements, collocation, resale and reciprocal compensation available to any Section 259 qualifying carrier as a minimal threshold and on terms more favorable than would be available under Section 251. MCI, p. 4, 5. There is no basis for such an interpretation of Section 259(a). If Congress had intended such an outcome, it would surely have worded this section in a

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[6] *Compare* 47 U.S.C. 153(20) *with* 47 U.S.C. 153(43).

way to make clear such an intention or at least referenced the standards established by Sections 251 and 252.

III. "QUALIFYING CARRIER" ISSUES

A. ESTABLISHING A REBUTTABLE PRESUMPTION FOR "RURAL TELEPHONE COMPANIES" WOULD BE REASONABLE AND IN THE PUBLIC INTEREST

Several commenters supported the Commission's suggestion of presuming that a class of carriers lack economies of scale or scope. In particular, a requesting carrier that meets the definition of a "rural telephone company" (47 U.S.C. 153(37)) would be presumed to lack economies of scale or scope for purposes of Section 259(d)(1). See ALLTEL Telephone Services Corporation, p. 2; AT&T, p. 3; MnIC, pp. 10-12; RTC, pp. 19, 20; USTA, p. 7. Of course, the rural telephone company would not be relieved of the requirement that it also be designated as an "eligible carrier" for the service area for which the sharing is requested. Section 259(d)(2). SWBT agrees with the Minnesota Independent Coalition's prediction found at p. 11 of its comments that "[i]t seems likely that Rural LECs will constitute the majority of the companies that meet these unique criteria." The use of this rebuttable presumption could result in a reduced administrative burden for requesting carriers and would be in the public interest. However, as noted in SWBT's Comments, even rural LECs may enjoy economies of scale and scope (SWBT, p. 3), and an incumbent LEC which has been requested to share must be allowed to rebut any presumption.

B. THE DEFINITION OF "QUALIFYING CARRIER" SHOULD NOT BE ARTIFICIALLY RESTRICTED

At the same time, a carrier should not be disqualified from becoming a qualifying carrier merely because of its size or classification. For example, NCTA urges the Commission to interpret the scope of Section 259 as "relatively narrow" to apply only to rural telephone companies that, in combination with their affiliates, serve fewer than two percent of the Nation's subscriber lines. NCTA, pp. 2, 3. Similarly, the Minnesota Independent Coalition states that "a large carrier, such as an RBOC, AT&T or MCI, does not lack 'economies of scale or scope' even if a particular project could be provided at a lower cost through infrastructure sharing with an incumbent LEC." MnIC, pp. 11, 12.

Neither interpretation is grounded in Section 259, which places no size restriction on qualifying carriers notwithstanding Congress' use of size limitations throughout the Act. As SWBT noted in its Comments, "[a]ny eligible carrier, regardless of size, could conceivably lack economies of scale or scope for particular infrastructure in a specific service area relative to another carrier." SWBT, p. 3. In a particular instance, even a Bell Operating Company or GTE could be a "qualifying carrier." Economies of scale or scope are relative concepts, and it is the degree to which one carrier lacks economies relative to another carrier that should be determinative. As RTC elsewhere points out, "the same LEC could, conceivably, be 'qualified' to request infrastructure sharing from one carrier and be required to serve as the providing [incumbent LEC] in response to a request for sharing by another qualifying carrier." RTC, p. 20. The Commission should reject any suggestions on placing a size limit on a qualifying carrier; if one had been desired, Congress surely would have included such a restriction when it defined "qualifying carrier."

C. INFRASTRUCTURE SHARING IS LIMITED TO AREAS WHERE THE "QUALIFYING CARRIER" IS AN "ELIGIBLE CARRIER" NOT IN COMPETITION WITH THE SHARING LEC

Claims to the contrary notwithstanding, Section 259 only applies where the qualifying carrier "qualifies" -- where it operates as an "eligible carrier" lacking relevant economies of scale and scope, and is not in competition with the sharing LEC. Sections 259(d)(1); 259(b)(6). The Association for Local Telecommunications Services ("ALTS") attempts to stretch Section 259 beyond its breaking point when it argues that infrastructure sharing is intended to assist the qualifying carrier in competing against the sharing LEC within its service area, or against other carriers where the qualifying carrier is not an "eligible carrier." ALTS, p. 3. By its plain language, Section 259 does not contemplate infrastructure sharing where a carrier is not a "qualifying carrier," and especially where such carrier is in competition with the sharing LEC. Section 259(b)(6). The Act gives no exceptions to these limitations.

ALTS cannot cure this fatal flaw by stating that the qualifying carrier need only pay a price "governed by Section 251" when used elsewhere. Id. Price is merely one element of an infrastructure sharing agreement, but ALTS' formulation would require all other terms and conditions to be made available. The terms and conditions, other than price, that might be negotiated in non-competing Section 259 arrangements could differ substantially from those that might be negotiated for the same arrangement under Section 251. If ALTS' position is adopted, all non-price terms would essentially be treated as "common carriage" terms in violation of

Section 259(b)(3) and would effectively read Section 252(i) into Section 259. Moreover, ALTS' suggestion would resurrect a form of the "pick and choose" formulation for negotiated agreements that is currently stayed.[7] The Commission should reject any reading of Section 259 that either contradicts the principle that infrastructure sharing agreements are not common carriage, or attempts to engraft a non-discriminatory provision where one does not exist.

Nor can Section 259 be stretched to require infrastructure sharing with carriers competing against a qualifying carrier under any circumstances. NCTA, pp. 5. The plain language of Section 259(a) limits infrastructure sharing to only those that meet the requirements of being a "qualifying carrier;" not to those that seek to compete with qualifying carriers. To the extent that a carrier competing with a qualifying carrier wants to be eligible for infrastructure sharing, Congress requires it to assume the attendant universal service burdens under Section 214(e) and 259(d)(2). This limitation clearly reflects the universal service purpose of Section 259, and cannot be ignored by the Commission. This conclusion is not an "unnecessarily inflexible" interpretation of Section 259(b)(6) as MCI argues. MCI, p. 10. It is simply the letter of the law.

In this regard, ALTS' discourse on "non-competing" carriers is perplexing. The Act allows any carrier, including a carrier qualifying for Section 259, to compete against an incumbent LEC. But if it does, it must either build its own infrastructure or negotiate the needed arrangement based on Section 251 of the Act; Section 259 arrangements are as a matter of law

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[7] See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325 (August 8, 1996) ("Interconnection Order"), appeals pending sub nom. Iowa Utilities Board v. FCC, No. 96-3321, and CompTel v. FCC, No. 96-3608, 8th Circuit.

not available for such use. This is not tantamount to an "agreement not to compete," but rather a legally authorized and permissible consequence of a decision to compete which would be limited to the area of competition. As U S WEST notes, that area of competition could be anywhere -- in the sharing LEC's traditional service area or in the qualifying carrier's service area. U S WEST, pp. 5, 6. Where the sharing LEC and the qualifying carrier compete, infrastructure sharing is not available as a result of Section 259(b)(6), and any pre-existing sharing agreements would have to be evaluated and perhaps re-negotiated.

ALTS further claims that it would be "virtually impossible for the Commission to police the operation of 'non-competing carrier' agreements in connection with Section 259." ALTS, p. 6. It is not necessary for the Commission to rule on ALTS' concerns over how compliance would be enforced. These issues should be addressed in the negotiations process and specified in the binding contractual agreements.

As final points, a qualifying carrier ("first carrier") that is an incumbent LEC should not be required to enter into infrastructure sharing arrangements with any other qualifying carrier ("second carrier") that would involve infrastructure it obtained from a providing carrier under Section 259. Since the infrastructure sought is not the first carrier's, it is not eligible for sharing and the second carrier is instead required to negotiate any Section 259 arrangement with the providing carrier. Moreover, any service provided by the first carrier using the shared infrastructure cannot be resold either outside of the area in which the first carrier "qualifies," or in competition with the sharing LEC. These limitations will help ensure that the shared infrastructure is used in accordance with Section 259.

Similarly, qualifying carriers that are incumbent LECs should not be required to unbundle shared infrastructure under Section 251(c)(3); again, carriers wanting the shared infrastructure must negotiate with the providing carrier, the incumbent LEC that actually provides the infrastructure. By sharing, infrastructure does not become "community incumbent LEC property," and the providing carrier retains the fundamental property right to negotiate its further use under Sections 251 and 259 by other carriers. Of course, the infrastructure sharing agreement could permit such second-tier sharing and unbundling, but it should not be required.

IV. INFRASTRUCTURE SHARING ARRANGEMENTS ARE TO BE TERMINATED UPON VIOLATION OF THE AGREEMENT, INCLUDING USE TO COMPETE WITH THE SHARING LEC

As with the rest of an infrastructure sharing agreement, termination provisions will need to be negotiated. Suggestions that those provisions require the inclusion of Commission-intervention in the termination process are thus as inappropriate as attempting to dictate prices and other terms and conditions of those agreements. The Commission should not insert itself into those provisions, such as requiring the filing of a complaint as RTC proposes. RTC, p. 12. Negotiating items such as the possibility of curing breaches, and potential excuses or defenses for breaches should be left to the parties. In no event should the Commission permit a breach of the agreement to continue or be excused due to acts of third parties. Id.

BellSouth Corporation notes the importance that the requesting carrier maintain "qualifying carrier" status so that its infrastructure sharing agreement with the sharing LEC is appropriate under Section 259 and not an improper exclusion under Section 259(b)(3). BellSouth Corporation, p. 8. SWBT supports this important observation, and also wishes to emphasize the need for flexibility to terminate sharing agreements that are no longer economically reasonable or in the public interest.

V. IT MIGHT BE ECONOMICALLY UNREASONABLE TO REQUIRE A SHARING LEC TO DEPLOY OR REPLACE FACILITIES TO MEET A QUALIFYING CARRIER'S REQUEST

RTC argues that where a request involves increasing the capacity of an existing facility, making the additional investment is well within the contemplation of Section 259 and will generally be beneficial to both parties because higher capacity facilities usually have a lower unit cost. RTC, p. 10. Although this statement may be true in some circumstances, increasing the capacity may require that the providing LEC replace existing facilities that would otherwise be perfectly adequate for the LEC's own use. While operating the new facility may be less costly on a per unit basis, per unit operating costs are not the only costs relevant to this decision. The sharing LEC must also factor in the undepreciated value of the old facility, and any expenses that result from transitioning to the new facility, in determining the cost of meeting the request. In such cases, carriers may be required to negotiate an infrastructure sharing arrangement, but sharing cannot be required without proper compensation under Section 259(b)(1).

VI. ANY INFRASTRUCTURE SHARING ARRANGEMENT MUST ACCOMMODATE INTELLECTUAL PROPERTY RIGHTS

As various parties recognized, the Commission should not attempt to mandate the blanket licensing of intellectual property. <u>See</u> GTE, p. 6; Sprint, p. 5; USTA, p. 5, 6. Third parties and sharing LECs may have legitimate and legally protectible intellectual property rights in infrastructure sought by a qualifying carrier. Whether any right does in fact exist will depend upon each particular request, and will require a specific determination for each request. One cannot, for example, take the AT&T approach and just presume such rights can never exist without even reading applicable licensing and other agreements (especially given licenses which may subsequently take into account the Commission's rules). AT&T, p. 2 n.2. The legislation does not authorize the Commission, a sharing LEC, or a qualifying carrier to ignore those rights, to dictate the terms and conditions that an owner of intellectual property must accept from a qualifying carrier, or to otherwise take private property.

VII. PRICES MUST BE BASED UPON PROPER ECONOMIC COST PRINCIPLES AND SHOULD REFLECT ALL COSTS RELEVANT TO THE ARRANGEMENT

MCI argues that to meet the Act's requirement in Section 259(b)(4) that qualifying carriers "fully benefit" from the providing carrier's economies of scale or scope, the Commission should set the prices of infrastructure sharing arrangements equal to short-run incremental cost, without recovering profit or common costs, and that for Section 251 facilities, the States' TELRIC-based prices,[8] adjusted for exclusion of profits and common costs, should become the permanent rate ceiling for Section 259 facilities.[9] This proposal has no economic merit and would force sharing carriers to engage in infrastructure sharing arrangements that would be economically unreasonable, in violation of Section 259(b)(1).

To accomplish the infrastructure sharing mandates of the Act, the price the sharing LEC

[8] MCI presumes that States are required to adopt TELRIC pricing for Section 252 pricing, or that States will uniformly require TELRIC pricing. Of course, these issues are also subject to appeal and dispute.

[9] MCI, p. 9.

charges must be based on proper economic cost principles and reflect all relevant costs. As SWBT has stated, relevant costs consist of all additional costs the sharing LEC incurs from infrastructure sharing, and includes a reasonable return to capital, including a risk premium, to help recover the initial start-up costs of deploying the shared infrastructure. The risk premium compensates the owners of the capital for the risk involved in deploying the infrastructure. Relevant costs also include the opportunity costs of engaging in infrastructure sharing, if any. Prices that at least recover all relevant costs will ensure that the mandates of the Act are met: infrastructure sharing results in the most efficient use of resources and thus meets the public interest mandate; price is set at the low level that still allows the sharing carrier to recover all relevant costs, but does not lead to increased profits; and the qualifying carrier benefits fully by obtaining infrastructure without imposing financial harm on the sharing carrier.

To deny the LEC the opportunity to recover these legitimate business costs from all users of that investment, including qualifying carriers wanting to share the infrastructure, would be economically unreasonable. At a price equal to short-run incremental cost, as MCI proposes, the sharing LEC would be compensated only for all costs directly attributable to that unit of production, but it would not properly compensate the sharing LEC for the shared and common costs associated with providing the infrastructure. Qualifying carriers would essentially get a "free ride" with regard to the major costs of the infrastructure it seeks to use through sharing. If the qualifying carrier were to undertake the infrastructure investment, it would similarly incur all these relevant costs. Certainly it would be unreasonable and economically improper to expect to make use of the infrastructure, but contribute nothing toward the recovery of the associated costs.

Proposals such as that offered by MCI would exceed any notion of "fully benefit" because they would benefit the qualifying carrier while being economically unreasonable for the sharing LEC.

VIII. INFRASTRUCTURE SHARING DOES NOT TURN QUALIFYING CARRIERS INTO NETWORK PLANNING PARTNERS

Certain commenters seem to imply that infrastructure sharing permits qualifying carriers to participate or be involved in the network decision-making by sharing LECs. For example, RTC suggests that infrastructure sharing may necessitate a "coordinated deployment schedule, rather than a schedule dictated by the providing LEC." RTC, p. 18. Although coordination is clearly needed for infrastructure sharing (especially in establishing the sharing arrangement), infrastructure sharing does not require an incumbent LEC to gain the acceptance of a qualifying carrier for its network plans and facilities deployment. Nothing in Section 259 inserts qualifying carriers into the incumbent LEC's planning process. When joint planning is required, Congress has made it an express obligation and even then does not require any agreement or permit any party to delay deployment. See 47 U.S.C. 273(e)(3). In light of that provision of the Act, Congress' silence on joint planning under Section 259 must be respected.

IX. CONCLUSION

As Congress envisioned, infrastructure sharing should be a matter of negotiation between incumbent LECs and qualifying carriers, and the Commission should refrain from burdening those negotiations with unwarranted and inappropriate standards and requirements.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

By: Darryl W. Howard

Robert M. Lynch
Durward D. Dupre
Michael J. Zpevak
Darryl W. Howard

Attorneys for
Southwestern Bell Telephone Company

One Bell Center, Suite 3520
St. Louis, Missouri 63101
(314) 235-2507

January 3, 1997

<u>CERTIFICATE OF SERVICE</u>

I, Liz Jensen, hereby certify that the foregoing, Reply of Southwestern Bell Telephone Company, in Docket No. 96-237, has been served this 3rd day of January, 1997 to the Parties of Record.

Liz Jensen

Liz Jensen

January 3, 1997

THOMAS J. BEERS,
COMMON CARRIER BUREAU
INDUSTRY ANALYSIS DIVISION
2033 M STREET NW ROOM 500
WASHINGTON DC 20554

SCOT K BERGMANN
COMMON CARRIER BUREAU
INDUSTRY ANALYSIS DIVISION
2033 M STREET NW ROOM 500
WASHINGTON DC 20554

KALPAK GUDE
COMMON CARRIER BUREAU
POLICY AND PROGRAM PLANNING DIVISION
1919 M STREET NW
ROOM 544
WASHINGTON DC 20554

ITS INC
2100 M STREET NW
SUITE 140 WASHINGTON DC 20037

ELLEN BRYSON
UTILITIES CONSULTANT FOR JACKSON THORNTON & CO PC
PO BOX 96
MONTGOMERY ALABAMA 36101-0096

RICHARD J METZGER
GENERAL COUNSEL
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES
1200 19TH STREET NW
SUITE 560
WASHINGTON DC 20036

HOWARD J SYMONS
CHRISTOPHER J HARVIE
MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO PC
701 PENNSYLVANIA AVENUE NW
SUITE 900
WASHINGTON DC 20004

DANIEL L BRENNER COUNSEL
NEAL M GOLDBERG COUNSEL
DAVID L NICOLL COUNSEL
LISA W SCHOENTHALER
DIRECTOR AND COUNSEL OFFICE OF SMALL SYSTEMS OPERATORS
1724 MASSACHUSETTS AVENUE NW
WASHINGTON DC 20036

AT&T CORPORATION
PETER H JACOBY
MARK C ROSENBLUM
PETER H JACOBY
295 NORTH MAPLE AVENUE
ROOM 3245H1
BASKING RIDGE NJ 07920

RICHARD J JOHNSON
MICHAEL J BRADLEY
MOSS & BARNETT
ATTORNEYS FOR MINNESOTA INDEPENDENT COALITION
4800 NORWEST CENTER
90 SOUTH SEVENTH STREET
MINNEAPOLIS MN 55401-4129

GLENN S RABIN
FEDERAL REGULATORY COUNSEL
ALLTEL CORPORATE SERVICES INC
655 15TH STREET NW
SUITE 220
WASHINGTON DC 20005

WILEY REIN & FIELDING
R MICHAEL SENKOWSKI
JEFFREY S LINDER
SUZANNE YELEN
1776 K STREET NW
WASHINGTON DC 20006

PACIFIC TELESIS GROUP
JAMES S HAMASAKI
LUCILLE M MATES
140 NEW MONTGOMERY STREET ROOM 1526
SAN FRANCISCO CALIFORNIA 94105

MARGARET E GARBER
1275 PENNSYLVANIA AVENUE NW
WASHINGTON DC 20004

MARY MCDERMOTT
LINDA KENT
CHARLES D COSSON
KEITH TOWNSEND
US TELEPHONE ASSOCIATION
1401 H STREET NW SUITE 600
WASHINGTON DC 20005

ROBERT B MCKENNA
ATTORNEY FOR US WEST
1020 19TH STREET NW
SUITE 700
WASHINGTON DC 20036

M ROBERT SUTHERLAND
A KIRVEN GILBERT III
ATTORNEYS FOR BELLSOUTH CORPORATION
1155 PEACHTREE STREET NE
SUITE 1700
ATLANTA GA 30309-3610

CAMPBELL L AYLING
ATTORNEY FOR NYNEX TELEPHONE COMPANIES
1111 WESTCHESTER AVENUE
WHITE PLAINS NY 10604

JAY C KEITHLEY
SPRINT CORPORATION
1850 M STREET NW
SUITE 1100
WASHINGTON DC 20036

CRAIG T SMITH
SPRINT CORPORATION
PO BOX 11315
KANSAS CITY MO 64112

ALAN N BAKER
ATTORNEY FOR AMERITECH
2000 WEST AMERITECH CENTER DRIVE
HOFFMAN ESTATES IL 60196

GAIL L POLIVY
GTE SERVICE CORPORATION
1850 M STREET NW
SUITE 1200
WASHINGTON DC 20036

JEFFREY S LINDER
SUZANNE YELEN
ATTORNEYS FOR GTE SERVICE CORPORATION
WILEY REIN & FIELDING
1776 K STREET NW
WASHINGTON DC 20006

MICHAEL J SHORTLEY III
ATTORNEY FOR FRONTIER CORPORATION
180 SOUTH CLINTON AVENUE
ROCHESTER NEW YORK 14646

LAWRENCE FENSTER
MCI TELECOMMUNICATIONS CORP
1801 PENNSYLVANIA AVE NW
WASHINGTON DC 20006

MARGOT SMILEY HUMPHREY
ATTORNEY FOR RURAL TELEPHONE COALITION
KOTEEN & NAFTALIN, LLP
1150 CONECTICUT AVE NW
SUITE 1000
WASHINGTON DC 20036

DAVID COSSON
L MARIE GUILLORY
ATTORNEYS FOR RURAL TELEPHONE COALITION
2626 PENNSYLVANIA AVE NW
WASHINGTON DC 20037

LISA M ZAINA
STUART POLIKOFF
ATTORNEYS FOR RURAL TELEPHONE COALITION
21 DUPONT CIRCLE NW
SUITE 700
WASHINGTON DC 20036

MARY B CRANSTON
THERESA FENELON
PILLSBURY MADISON & SUTRO LLP
ATTORNEYS FOR OCTEL COMMUNICATIONS CORPORATION
1100 NEW YORK AVENUE NW
NINTH FLOOR EAST TOWER
WASHINGTON DC 20005

ROGER HAMILTON CHAIRMAN
RON EACHUS COMMISSIONER
JOAN SMITH COMMISSIONER
OREGON PUBLIC UT8LITY COMMISSION
550 CAPITOL STREET NE
SALEM OREGON 97310-1380